Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-173

DAILY MIRROR, INC.,

Petitioner,

vs.

NEW YORK NEWS INC., HARRY (HENRY) GARFINKLE, UNION NEWS INC., AMERICAN NEWS CO. INC. and ANCORP, INC.,

Respondents.

SUPPLEMENTAL APPENDIX

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DECISION OF D.J. FRANKEL DATED JUNE 9, 1975 GRANTING SUMMARY JUDGMENT BY DEFAULT ETC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAILY MIRROR, INC.,

Plaintiff,

-against-

NEW YORK NEWS INC., HARRY GARFINKLE, UNION NEWS COMPANY, INC., AMERICAN NEWS COMPANY, INC., and ANCORP, INC.,

Defendants.

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FRANKEL, D.J.

This action was brought over four years ago. Plaintiff corporation, which commenced publication on January 4, 1971, of a tabloid newspaper,[1] charged that defendants — a highly successful competitor, three companies engaged in the distribution of newspapers and other publications, and an individual principal of these companies — had violated the antitrust laws by conspiring from January 1971 to restrain and monopolize commerce in the dissemination of news and newspapers. Defendants' objects, plaintiff alleged, included in general the suppression of competition, specifically the elimination of plaintiff as a competitor, and the concerted refusal to distribute plaintiff's newspaper to newstands and other distribution points controlled or serviced by defendants. With

1. Plaintiff's paper, called "The Daily Mirror," was unrelated to a once famous newspaper, "The New York Mirror," which ceased publication in 1963.

the specification of further details not now necessary to recount, plaintiff charged wrongs under the state as well as the federal antitrust statutes plus a common-law count for conspiratorial and malicious injury. Damages amounting to some $90,000,000 were sought, together with costs and attorneys' fees.

While the complaint seemed to propose questions of possible moment, it was prosecuted only occasionally and slowly. Within months after the start of the case, plaintiff's chief executive officer was substituted as counsel in place of the original attorney. While the action had been brought a scant two months after plaintiff embarked on its risky venture in competition with two of the world's most powerful newspapers, plaintiff did nothing to press it for over two years, having in the meantime ceased publication altogether about a year after beginning its business and this lawsuit. When there came a threat of dismissal for want of prosecution, in the summer and fall of 1973, plaintiff took some depositions. About a year later there were some interrogatories. Sporadic motions were made along the way. Defendants' interrogatories were answered only under a threat of dismissal as the alternative. The answers finally made were notable for their brevity and asserted lack of pertinent information.

Without recounting every procedural detail, it suffices for now to recall that on March 14, 1975, this ancient case was reassigned to me under this court's "Plan for the Reallocation and Disposition of Three-Year-Old Civil Cases." The plan, as bench and bar were made vividly to understand, was designed to see that cases like this one were given the highest possible priority so that we could move closer to the ideal of current dockets and reasonably prompt trials for litigants who want them. The rules to accomplish this were thoroughly publicized. These provided, *inter alia:*

"By April 1, 1975, each judge shall notify counsel in each of the 'old cases' then on his calendar * * * of a pretrial conference no later than May 15, 1975. At such conferences, all the cases will be set for trial during the 6-week 'crash' period commencing June 2, 1975 and ending July 11, 1975, in chronological sequence as nearly as possible, each trial to commence upon conclusion of the trial of a specified preceding case. Claims of conflicting assignments in other courts, vacation schedules or personal commitments shall not be accepted as an excuse except on a showing of extraordinary hardship. Counsel shall be notified that if they are not ready for trial when called, their cases shall be subject to dismissal for want of prosecution or to striking of their pleadings and entry of default."

In accordance with the rules, this case was called for a pretrial conference on March 26, 1975. Counsel were reminded that it must be readied for trial with minimum delay. Stringent limits were ordered on any further discovery. It was pointed out that desired witnesses who have not been deposed during all these years may be subpoenaed for the trial, a course less wasteful of time in the end than allowing the case to drag on in its accustomed way. Counsel were advised on March 26 to be ready for trial on the morning of June 9, 1975.

Defendants urged, however, that they be given an opportunity to move for summary judgment. In informal discussions, I pointed out the seeming remoteness of the possibility that any such motion could succeed, moved by fairly obvious thoughts:

> *First,* that a supposedly large antitrust case is among the least likely candidates for summary judgment.

Second, that the motion should better have been made earlier.

In seemingly cogent answer to both points, counsel brought to my attention that there was no pretrial order in the case; that a summary judgment motion, even if denied, could serve to crystallize the issues to be tried; and that this antitrust case, however large and complex a matter the complaint might have seemed to portend, was actually of exceedingly modest proportions in terms of what plaintiff might hope to present in the way of evidentiary material. Adhering to the prediction that it could not succeed, and reemphasizing that the date of June 9 for trial would still stand, I agreed that the motion should be brought, duly opposed, and decided. A schedule for submissions was made. One or two brief adjournments were allowed. The motion papers — thorough and powerful, as will appear — were duly served and filed at the beginning of last month.

In the meantime, pursuing a course that does not appear to be new for him in this case, plaintiff's counsel continued small discovery efforts, wrote long and often vitriolic letters to me when his adversaries acted in ways he deemed unsuitable, and otherwise did nothing to advance his case. Responding sometimes without excessive patience, I demanded an end to the epistolary practice; instructed plaintiff's counsel to serve motion papers if he believed there were grounds for making motions; but reminded him that in the present posture the time for making all but the most indispensable of motions had largely run.

In light of, or perhaps despite that instruction, Mr. Farrell moved on May 19 for an order allowing further discovery and production of documents, permitting plaintiff to reargue for the disqualification of one of the attorneys in the case, and granting a further delay in this ancient case. That motion was made returnable May 27, the same return date carried by the summary

judgment motion.[2] On the afternoon of May 27, plaintiff's counsel was contacted by my chambers when it became apparent that no papers had been filed in opposition to the summary judgment motion. Plaintiff's counsel asked for a week's extension, and was given until May 30.

On Thursday afternoon, May 29, 1975, plaintiff's counsel reported by telephone to my law clerk, Mr. William J. Perlstein, that he had decided not to file any answer whatever to the motion for summary judgment but was instead filing an application in the form of an affidavit seeking my withdrawal from the case. Mr. Farrell stated, and was later to reiterate, that this paper was being filed that day. When we sought in the Clerk's office to obtain the paper, it was not there. It was not served then or thereafter upon opposing counsel. When this situation was called to Mr. Farrell's attention at the beginning of the following week and he was asked to file another copy, he balked initially unless the Clerk would docket it as having been filed on Thursday, May 29. Finally, upon my order, the Clerk accepted and docketed the paper, with the understanding that the claim of earlier filing would not thereby be deemed to be foreclosed. As it turns out, the date of filing is not important in any event. But it is perhaps pertinent to note that defense counsel swear they have not, at least until now, been served by plaintiff with the application seeking my recusal.

Coming at last to the application, I am compelled to find it insufficient for any purpose — either to accomplish my relief from the case or to delay further a decision in defendants' favor on their motion for summary judgment. As to the proposal that I recuse myself, Mr. Farrell swears it is made "in good faith," and I have no reason to question that. But it remains ineffectual. Mr. Farrell expresses his "belief and conviction" that I am "personally hostile to plaintiff's cause"; that he is being pressed

2. The eventual disposition herein, dismissing plaintiff's complaint, embraces of course a denial of the grossly tardy and otherwise unmeritorious motion of plaintiff.

to meet deadlines "without proper or just or due attention by the Judge to adversaries as the extensive cause for the delays the Judge is complaining of"; that I have been "over-harsh and oppressive and arbitrary" as well as "cursory"; that I have directed "anger" at plaintiff when it should be aimed at defendants; that he is convinced, in sum, "that he cannot get a fair disposition of the present motions and of the trial" before me.

I am sorry, of course, that Mr. Farrell perceives things like anger and personal hostility against himself and/or his client. I cannot pretend to be cheered by learning that he feels this way. But the duties of the office are plain and Mr. Farrell's complaints are plainly sleeveless. So far as I am aware, I have never known Mr. Farrell or his client until this case. Having seen him in person a single time, I sense for myself none of the hostile emotions he detects. Indeed, I have not known Mr. Farrell or this lawsuit long enough to have feelings about either that could fairly be dubbed "emotional." What is more vital in law is the obvious fact that his inferences flow only from my rulings and conduct as the judge assigned to this case. I think it clear that the assertions he presents fail on their face to make out any such "bias or prejudice" as could require — or entitle — me to remove myself from the case at this late date — or, indeed, at any time.

In order to reach and consider this question (including the location of the paper presenting it), I ordered the trial adjourned from June 9 to June 16, 1975. But it is time now to deal with the pending motion. And it develops that there will be no occasion to have a trial after all.

Apart from the regrettable fact that they are unopposed, the papers supporting the motion make a careful and compelling case for dismissal of the complaint. There are detailed and specific affidavits by the people with knowledge denying the acts

of conspiracy and other wrongdoing conclusorily charged in the complaint. Beyond that, defendants supply a highly persuasive account of facts which, even as plaintiff alleged them, presented a dubious setting for the allegations of wrongdoing. As has been noted, plaintiff charged a conspiracy beginning with the birth of its short-lived enterprise. It appears to be undisputed that plaintiff's newspaper was carried upon the allegedly offending newsstands during the first week or so of its publication. Contrary to the contention that this resulted from an oddly neglectful conspiracy which lapsed into forgetfulness for a week, defendants show that the altered situation was caused by plaintiff's change to a new wholesaler which offered the newspaper at a price increased beyond what defendant Ancorp deemed justified. It is sworn persuasively that defendant Daily News had nothing whatever to do with this business decision.

Beyond the detailed accounts supplied in their own affidavits, defendants review what they have learned from their own discovery efforts. They show the enormous probability that plaintiff could make no approach to a prima facie case at trial. Responding to interrogatories, plaintiff has acknowledged its entire lack of evidence to prove its charges. In a case this old it is much too late to try to resist summary judgment by saying plaintiff might be able to supply the missing evidence by calling upon defendants themselves. Plaintiff has had four years to make such calls and a court available to enforce them if resisted. The evident fact is that the discovery plaintiff has seen fit to undertake has not reinforced the gossamer of speculation and hope on which the action seems to have been rested from its inception.

The relevant learning concerning motions for summary judgment is clear and familiar. Defendants have done more than plaintiff, defaulting, is entitled to. Beyond confronting a plaintiff who does not deign to respond, defendants have shown that the absence of response reflects an overwhelming probability that

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plaintiff has nothing to respond with. There is not in any pertinent sense any genuine issue as to any material fact. Defendants are entitled to the judgment they seek.

In sum, the motion for summary judgment is granted. Alternatively, or perhaps additionally, the circumstances would warrant dismissal of this ancient and evidently unmeritorious case for failure to prosecute. Plaintiff has managed to avoid utterly the steps ordered to ready the case for trial, scheduled over two months ago to begin today. Apart from more general rules and principles, the plaintiff is in default under this court's above-quoted Plan for cases as old and neglected as this.

The Clerk of the Court will enter judgment dismissing the case with prejudice and with costs to defendants.

It is so ordered.

MARVIN E. FRANKEL
U.S.D.J.

Dated, New York, New York
June 9, 1975

DECISION DATED JULY 3rd, 1975 (FILED JULY 7th, 1975) OF D.J. MARVIN E. FRANKEL DENYING MOTION TO VACATE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAILY MIRROR INC.,

Plaintiff,

-against-

NEW YORK NEWS INC., et al.,

Defendants.

71 Civ. 1211

MEMORANDUM AND ORDER

U.S. District Court
Filed
Jul. 7, 1975
S.D. OF N.Y.

FRANKEL, D.J.

Plaintiff's motion filed June 30, 1975, and made returnable today seeks, "before a properly assigned Judge . . . or such other as may be assigned for the hearing hereof, . . . an Order vacating *ab initio* the . . . Decision-Memorandum [dated June 9, 1975], and any Judgment entered thereon or to be entered thereon, as an extra-judicial act, a legal anomaly, a nullity in law, an abortive attempt of the Judge to effect a single, joint and concurrent disposition of two incompatible judicial processes, one in personal recusance of the deciding Judge, and the other in

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adjudication of the pending case, and as surprise product of undue haste and a denial of due process, and for such other and further relief, by way of reinstatement of a time schedule for the further prosecution and defense of the within case, and otherwise as may be fitting in the premises."

The motion is denied.

It is so ordered.

MARVIN E. FRANKEL
U.S.D.J.

Dated, New York, New York
July 3, 1975